IN THE

Supreme Court of the United States

October Term, 1968

No. 1127

TECHNITROL, INC.,

Petitioner,

vs.

HONORABLE EDWARD J. McMANUS, United States District Judge For the Northern District of Iowa, Cedar Rapids Division,

Respondent.

REPLY BRIEF FOR PETITIONER

I—GENERAL

The majority of the allegations and arguments contained in the Brief for Respondent, Collins Radio Company (Respondent) are fully refuted in the Petition and such refutation is not repeated here. However, in its Brief, Respondent relies heavily upon basic fallacies in logic in the following areas:

1. Petitioner's Procedures in the Courts Below.

Respondent criticizes at length (RB 7-10)[1] the several procedural steps taken by Petitioner to protect its rights in the Courts below (P 6-14). This presents a typical situation in which a number of alternate procedures are

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[1] Herein, the following abbreviations are used:
P — The Petition herein.
A — Appendix to the Petition.
RB — Brief of Respondent Collins.
RA — Appendix to Respondent's Brief.

open to a party and his opponent automatically takes the position that whichever procedure is selected by the party as most appropriate is the wrong one, followed by an imputation of bad faith in having selected that procedure. The appropriateness of Petitioner's procedures has been set forth in the Petition and the inappropriateness of the alternate procedures suggested by Respondent is also pointed out.

2. The Questions Presented.

Respondent's argument that Petitioner's "QUESTIONS PRESENTED FOR REVIEW" (P 3-4) are not before the Court is based on its assumption of the correctness of the very holdings of the Court of Appeals below which are here under attack. This familiar "bootstrap" logic is not persuasive.

Respondent's Brief also includes several misleading and inaccurate statements asserted for the first time. These are answered in an Appendix hereto.

II—THE ADEQUACY OF PETITIONER'S REMEDY BY APPEAL FROM FINAL JUDGMENT

This issue is squarely presented by Question (4) of the Petition (P 4). With respect to this question, Respondent has asserted that the question is "improper" (RB 17) and that

> "* * * This question is also not dispositive of this case, but is at most an incidental issue.
>
> "It also should be rejected." (RB 19)

Inconsistently, Respondent, in the immediately following section of its Brief, states as its first and foremost reason for denying the Petition:

"1. *The petition is unnccessary since petitioner has a remedy by appeal.*" (RB 19)

The authorities holding that an appeal from a final judgment is *not* adequate relief from an improperly granted order of transfer under Section 1404(a) (P 5) are discussed in the Petition (pp. 17-18).

Respondent cites in support of its position *Ex parte Fahey* (1947) 332 US 258 and *Bankers Life & Casualty* v. *Holland* (1953) 346 US 379. The *Fahey* case involved a petition seeking to invoke *original jurisdiction* of this Court to issue a writ of mandamus directed to a Judge of the Southern District of California to prohibit allowance of attorney's fees in a pending action. This Court held the petition premature and that relief should be by appeal in the main action. The language of the decision quoted by Respondent (RB 20) relates to the power of this Court to issue writs of mandamus in the exercise of its original jurisdiction. The decision is not apposite to the facts of this case.

The *Bankers Life & Casualty* case was a treble damage antitrust action based on an alleged conspiracy of a number of companies and individuals. The case was brought in the Southern District of Florida and named as one of the defendants the Insurance Commissioner for the State of Georgia. On motion of the latter, the District Court severed the action against him and transferred it to the District of Georgia because of improper venue in Florida.

The petitioner then filed its petition for a writ of mandamus to the Fifth Circuit Court of Appeals to vacate the order of severance and transfer. Upon dismissal of that petition, petitioner sought review by this Court on certiorari. This Court stated the question presented:

> "The question here is whether mandamus is an appropriate remedy to vacate a severance and

> transfer order entered by a district judge on the ground of improper venue, under 28 U.S.C. Section 1406(a), 28 U.S.C.A. Section 1406(a)."

The petitioner attacked the order of the District Court solely on the ground that it lacked the "power" to order the transfer under Section 1406(a) when it was conceded that that Court did have jurisdiction over the subject matter and the person of the defendant.

While this Court affirmed the Court of Appeals' dismissal of the petition for a writ of mandamus solely on the ground that the District Court did have such "power", the decision indicates clearly that it was strongly influenced by this Court's conviction that the petitioner's case lacked merit. First, it recognized the use of such a writ "where there is a clear abuse of discretion" (p. 383), as in the instant case, and continued:

> "We note additionally that the petitioner has not met the burden of showing that its right to issuance of the writ is 'clear and indisputable'."

This Court then pointed out that the applicable antitrust statute, Title 15 U.S. Code Section 15, contemplated the very procedure adopted by the District Court and concluded:

> "* * * Thus petitioner's theory has all the earmarks of a frivolous albeit ingenious attempt to expand the statute."

In dissent, Justices Frankfurter, Jackson, and Minton make it clear that the opinion of this Court was limited to the facts of that case, saying:

> "Discussion of mandamus in this case is not even useful as *dicta* for future guidance on an important issue. The Court's opinion does not help decision when a party is dismissed from a litigation for

reasons not as obviously compelling as those in this case. *It necessarily leaves open the question whether such a ruling by a district judge may be reviewed by mandamus, without awaiting the completion of the entire litigation, in circumstances where postponement of review would involve a protracted trial, entailing heavy costs and great inconvenience.* (Citing cases.) This Court ought not to be called upon to hold that where a district judge refused to entertain a 'frivolous' claim, mandamus will not issue to compel him to entertain it. But that is the only holding of the Court's decision today." (Emphasis added)

III—PETITIONER'S POINT 2—The Court of Appeals Below Has Decided an Important Question of Federal Law Which has Not Been, but Should Be, Settled by This Court.

Petitioner has pointed out (P 24-27) that the decision in *Hoffman* v. *Blaski et al.* (1960) 363 US 335, tacitly approved review of a transfer order under Section 1404(a) by the Courts of the transferee Circuit.

Respondent asserts (RB 21, 23-24) that the *Hoffman* v. *Blaski et al.* decision was limited to cases in which the *jurisdiction* of the transferee District Court was in question and, hence, that the decision has no application to the instant case. A careful reading of that decision shows that it is not so limited. While the Seventh Circuit Court of Appeals, in granting mandamus, did so on the basis that it had determined that the action could not have been brought in Illinois so that the Court below lacked jurisdiction, the principle that the transferee Court and the Court of Appeals on mandamus may reexamine the propriety of transfer under Section 1404(a) seems well established by this decision which applies *regardless of*

the grounds on which the original transfer was opposed.[2] This conclusion is confirmed by the concurring opinion of Mr. Justice Stewart, which is not predicated on any particular basis for opposition to the original transfer:

> "Two Courts of Appeals disagreed about the meaning of a federal law, as conscientious federal courts sometimes do. From the point of view of efficient judicial administration the resulting history of this litigation is no subject for applause. But, as the Court points out, no claim was made here that the decision of the Fifth Circuit precluded Judge Hoffman or the Seventh Circuit from remanding the case, and on the merits of that question I agree with the Court that principles of res judicata were inapplicable. * * *"

This interpretation of the *Hoffman* v. *Blaski et al.* decision is also confirmed by the dissenting opinion of Justices Frankfurter, Harlan, and Brennan who urged that the review by the Court of Appeals of the Fifth Circuit of the transfer order by the Texas Court, on the merits, was *res judicata* and that there was no right of review by the Court of the Seventh Circuit, saying:

> "* * * Nor does such a view of the right and wise judicial administration *depend upon the nature of the procedural or even jurisdictional issue in controversy.* * * *" (Emphasis added)

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[2] The Seventh Circuit Court of Appeals limited its decision to retransfer on the ground that the Texas Court had no *power* to transfer the action to Illinois, saying:
"It must be clearly kept in mind that there is no issue of discretion involved in the instant matter either on the part of the Texas District Judge in ordering the transfer or on the part of the respondent in refusing to remand it. * * *"
However, the decision of this Court disregards such a distinction.

IV—RECAPITULATION

The reasons relied upon by Petitioner for the granting of the writ (P 3) and the related analyses under POINTS 1 and 2 (P 20-27) have tended to become beclouded by the inevitable factual details of the proceedings in the Courts below, as set forth in the Petition (pp. 6-14) and in Respondent's Brief (pp.3-16). It may be helpful to the Court to summarize Petitioner's arguments in support of its reasons for the granting of the writ and the questions presented for review.

1. The starting point of this whole controversy was the hasty action of Judge Smith of the Georgia Court in transferring the Action "forthwith" to the Iowa Court before all the facts were in, thereby precluding Petitioner from seeking reconsideration before him or review by the Court of Appeals of the Fifth Circuit by mandamus or certification under Title 28 U.S. Code Section 1292(b) (P 7)[3].

2. Both in view of the foregoing hasty action of the Georgia Court and because of Petitioner's understanding that the weight of authority holds that review of the Transfer Order of the Georgia Court should be sought in the Courts of the transferee district, Petitioner filed in the transferee Iowa Court its Motion to Remand or Retransfer the Action to the Georgia Court (P 9, 20-24)[4].

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[3] The Court of Appeals below criticized the Georgia Court for its precipitate action, suggesting that the Transfer Order should have been held up "for a reasonable time pending possible petition for reconsideration or review" (A3-4).

[4] The Court of Appeals below noted the conflict between the Second Circuit on the one hand and the Fourth and Seventh Circuits on the other hand as to which Court of Appeals should review such a transfer order (A 4). As was said by Judge Learned Hand in the *Magnetic Engineering* case cited by the Court below: "• • • it would have been absurd to decide anything in an action which had already been transferred elsewhere; • • •."

3. Moreover, Petitioner's understanding was that review of the Transfer Order should, in the first instance, be sought in the transferee District Court rather than in the Court of Appeals for that District (P 9; f.n. P 19)[5].

4. Upon the filing of Petitioner's Motion to Retransfer or Remand in the Iowa Court, that Court had the duty independently to review the original Transfer Order of the Georgia Court on the merits. This it failed to do and the Court of Appeals below approved such action[6].

V—CONCLUSION

Respondent has advanced no persuasive reason why the writ should not be granted and such action is sclicited.

Respectfully,

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S. C. YUTER,
Counsel for Petitioner.

April 15, 1969

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[5] The Court of Appeals below found Petitioner guilty of unreasonable delay mainly because of the time spent in seeking retransfer in the Iowa Court (A4, 4th para.; A8, 2nd para.). Petitioner was also penalized for the time spent in seeking settlement of the Action after Respondent agreed with Petitioner to suspend further activities in the case in order to encourage settlement. This agreement was breached by Respondent when it moved in Georgia to transfer, dismiss, or stay the *Ex-Cell-O-Collins-Delta* Action which had been filed prior to the settlement exploration agreement. (Yuter Aff., para. 13, PEX 3-2, Exhs. 4, 5; See also Petition, p. 19, para. (1) and footnote.)

[6] The Iowa Court held that such a review would constitute "• • • a usurpation of appellate function and interference with orderly judicial process. • • •" (A14). The Court of Appeals below held that "• • • Judge McManus was justified in exercising his discretion by refusing to redetermine the same issue • • •." (A11).

APPENDIX

Respondent's Brief contains several assertions which are inaccurate or misleading, or both, and which require correction to avoid their cumulative misleading effect. Comments on misstatements completely refuted in the Petition are not repeated here.

Assertion	Correction
"This petition is the result of a frantic scramble by petitioner to localize this litigation in the Fifth Circuit rather than in the Eighth Circuit, because of an apparent belief that the Fifth Circuit affords a more favorable climate to patent owners." (RB 2-3)	Actually, it is Respondent that is guilty of frantic forum shopping, seeking to nullify Petitioner's right to select a proper forum in which to bring its infringement action, namely, the District Court in Georgia, where the major infringing data processing system is located and operating.
"[5] Petitioner has raised and raises here no contention that the Georgia Court failed to consider any appropriate factor." (RB 5)	This assertion is directly contrary to Petitioner's contentions. The Georgia Court did not have before it the deposition testimony and documentary exhibits which conclusively proved the falsity of critical assertions in the Phillion Affidavit submitted to the Georgia Court by Respondent (P 7-10; PEX 5).
Referring to Petitioner's Petition for a Writ of Mandamus in the Court of Appeals below, Respondent's Brief asserts: "• • • Thus, at pages 1 to 3 (RA 1-3), under the heading 'Summary of Petitioner's Position,' there is not a single error or abuse ascribed to Judge McManus. • • •" (RB 12)	This statement is wholly misleading. In the Petition in question, Petitioner explicitly included its assignment of error in the decision of Judge McManus in the *"Issues Presented"* and *"Relief Sought"*, both reproduced in Respondent's very quotation from that Petition (RA 3, RA 4).